IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 6TH JULY 2007 / 15TH ASHADHA 1929

WP(C).No. 17353 of 2005(N)

OS.139/1999 of SUB COURT, CHERTHALA
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PETITIONER:

KOMALAVALLI,
ASSARIVELI HOUSE, PARAVOOR, PUNNAPRA, ALAPPUZHA.

BY ADV. SRI.DEEPU THANKAN

RESPONDENTS:
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1. K.K. KAUSALYA,
ASSARIVELI HOUSE, PARAVOOR, PUNNAPRA, ALAPPUZHA.

2. T.K. SASI,
ASSARIVELI HOUSE, PARAVOOR, PUNNAAPRA, ALAPPUZHA.

3. RADHAMANI,
ASSARIVELI HOUSE, PARAVOOR, PUNNAPRA, ALAPPUZHA.

4. P.K. KUMARAN,
ASSARIVELI HOUSE, PARAVOOR, PUNNAPRA, ALAPPUZHA.

R2 BY ADV. SRI.K.V.SADANANDA PRABHU
SRI.T.GOPALAKRISHNAN
R1 & R3 BY ADV.SRI.MANOJ B.MENON
SMT.M.K.PUSHPALATHA
SRI.TOM K.THOMAS

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE,J.

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W.P.(C) No.17353 of 2005

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Dated: 6th July, 2007

JUDGMENT

The plaintiff in O.S.No.139/99 on the files of the Principal Sub Court, Alappuzha being aggrieved by the order passed by the Sub Court in I.A.No.2146/04, a proceeding for passage of final decree has filed this Writ Petition under Article 227 of the Constitution. The respondents are the defendants in the suit. The petitioner and respondents 2 and 3 are daughters of late V.K.Karunakaran. The 1st respondent is the wife of Karunakaran and mother of the petitioner as well as respondents 2 and 3. The 4th respondent is the husband of the 2nd respondent. The suit was filed by the petitioner for partition of properties belonging to late V.K.Karunakaran, her father. It is submitted that Karunakaran had 35.5 cents of land at the time of his demise and that during the pendency of the suit, a compromise was arrived at between the parties and accordingly a compromise preliminary decree was passed by the court below. According to the terms of the preliminary decree the extent of the plaint schedule property as presently found on measurement has to be divided into 4

equal shares from east to west. There is a cinema house building on a portion of the plaint schedule property and the condition in the compromise decree is that the party in whose share the land upon which the cinema house is to be allotted after demarcation has to transfer the theatre to the 2nd respondent who will be liable to pay market value of the theatre building and the appurtenances. Thereupon only the transfer deed will be executed. It is also stated in the compromise petition that the value of the theature building will have to be determined by 4 public men of the locality whose names are mentioned in the compromise decree.

2. In the final decree proceedings, the 2nd respondent filed an application for appointment of a Commissioner for demarcation of the properties. The petitioner submits that the very prayer in the application for appointment of Commissioner was against the terms of the preliminary decree. The prayer was the property having an extent of 47 cents should be divided and the further prayer was that the Advocate Commissioner shall fix the value of the property including the buildings. Ext.P1 is copy of the preliminary decree. Ext.P2 is copy of the final decree application filed by the 2nd respondent and Ext.P3 is copy of the commission application filed by

him. According to the petitioner, the property which is liable to be partitioned is only 35.5 cents of land. V.K. Karunakaran to begin with was having a total extent of 47 cents. From out of that during his life time he executed a sale deed in favour of the third respondent in respect of 11.15 cents and what was left behind by Sri.Karunakaran is only 35.5 cents. To Ext.P3 application the petitioner filed objection which was also in the form of a petition. Ext.P4 is copy of the above said objection petition filed by the petitioner. Ignoring the objections raised through Ext.P4, the court below appointed Advocate Cyril Joseph as Commissioner. The petitioner submits that since no specific orders had been passed on the various objections raised through Ext.P4 (I.A.No.1954/04), he filed a separate petition as I.A.No.2146/04 for directing the Advocate Commissioner appointed in Ext.P3 I.A. to partition the property after measuring the properties in terms of Ext.P4. Ext.P5 is copy of that I.A. The Court below dismissed Ext.P5 and Ext.P6 is copy of that order. Thereafter the Commissioner has issued Ext.P7 and in the Writ Petition the petitioner challenges Ext.P6 and prays that the same be quashed and the court below be directed to issue specific guidelines to the Commissioner in terms of the preliminary decree.

3.The 2nd respondent has filed a detailed counter affidavit in the Writ Petition. Ext.R2(a) is copy of the written statement which had been filed by the 2nd respondent in the suit. Ext.R2(b) is copy of an application filed by the 2nd respondent seeking permission to include a further extent of 11.25 cents of land in the schedule of properties to be partitioned on the basis that the sale deed executed by Karunakaran in respect of those 11.25 cents is a sham document. The 2nd respondent also filed a separate petition for raising an additional issue regarding the validity of the above sale deed. Ext.R2 (c) is copy of that application. It was while the suit proceeded thus with the parties taking extreme positions regarding the partibility of the disputed 11.25 cents that mediators intervened and the parties chose to settle the disputes. It is contended that on reading the compromise petition and the decree passed therein in the context of the contentions in their proper perspective, it would be seen that the property which was agreed to be partitioned is not the decree schedule property alone. The compromise will show that the assignee of 11.25 cents withdrew from all her claims over that property and the 2nd respondent withdrew from her contention of adverse possession which had been raised in respect of a portion of the

decree schedule property. Ext.R2(d) is copy of the settlement. To hold that the settlement does not take in 11.25 cents covered by the sale deed in question will render clauses 1 and 2 of the compromise decree otiose and meaningless. Ext.R2(e) is a true copy of the plan prepared by the Commissioner on 27.6.2002. A reading of Ext.R2(e) and clauses 1 and 2 of Ext.P1 compromise decree makes it clear that what was agreed to be settled was all the disputes in relation to the property of late Karunakaran and not the dispute relating to the suit schedule property alone. A division is impossible if one is to divide the property east-west. Significantly, the decree is silent regarding the portion of the property to be taken by the 2nd defendant. The preliminary decree only specifies that the next division excluding the portion of property where on the 2nd defendant's house is located is the share of the third defendant.

4. Respondents 1 and 3 have also filed a counter affidavit. It is contended therein that the request in the commission application was to measure 47 cents. But the property ordered to be partitioned is the actual extent found after measurement. There was no stipulation in the decree for fixation of market value by the Commissioner. The 2nd respondent requested the Commissioner to report this aspect

which is against the terms of the compromise decree. Ultimately, it is contended that to measure the actual extent and thereafter to effect partition based upon the terms of the compromise decree.

5. I have heard the submissions of Mr,Deepu Thankan, counsel for the petitioner, Mr.Manoj B.Menon, counsel for respondents 1 and 3 and also those of Mr.K.V.Sadananda Prabhu, counsel for the 2nd respondent.

6. Having considered the rival submissions in the light of the pleadings raised by the parties and the facts emerging therefrom and also from the various materials placed on record including the circumstances attending on the case, I find force in the submission of Mr.K.V.Sadananda Prabhu that the settlement under compromise petition was not in respect of the plaint schedule property alone but it covered the properties covered by the assignment deed in favour of mother Kausalya. So also I find merit in the contention of Mr.Deepu Thankan that the Commissioner should not have been asked to value the buildings since valuation of the buildings had been left under the compromise petition to be decided by the four public men mentioned therein and not by the Advocate Commissioner. I also notice some substance in the submission at the Bar that the compromise petition

which was filed in court and in respect of which the preliminary decree was passed is likely to result in difficulties for all parties.

7. Considering the merit noticed in the submissions of Mr.Sadananda Prabhu and Mr.Deepu Thankan as referred to above, I set aside the impugned order and direct the court below to issue appropriate directions to the Commissioner so that the commission warrant will pertain to the measurement of the entire properties including the properties covered by the assignment deed in favour of Kausalya. The question of determining the value of the building will not be referred to the Advocate Commissioner. The same will be referred to the 4 public men whose names are mentioned in the settlement. The question of determining the valuation of the building need be referred to the public men only after the properties are divided and separated. The question of determination of the value is directed to be deferred by the court below tilll such time as the division of the properties is completed. The court below will ensure that the Commissioner files its report at his earliest. The court below is also directed to explore the possibility of a rapproachment between the parties so that the disputes will come to a quietus.

The Writ Petition is allowed to the above extent. But in the circumstances, without any order as to costs.

srd **PIUS C.KURIAKOSE, JUDGE**